Bersih & Adil Network Sdn Bhd & Ors v Tan Sri Dato' Hj Mahiaddin bin Md Yasin (in his capacity as Prime Minister of Malaysia) & Anor (Khairil Nizam bin Khirudin & Ors, intervener) and another application

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24–6–02 OF 2021 AND WA–24-22–04 OF 2021
AHMAD KAMAL J
4 JULY 2022

Constitutional Law — Courts — Reference to Federal Court — Plaintiffs sought to declare Emergency (Essential Powers) Ordinance 2021 and Constitution (Amendment) Act 1981 unconstitutional — Plaintiffs applied to High Court to refer constitutional questions to Federal Court — Whether constitutional questions framed to be referred to Federal Court were within ambit of Federal Court's jurisdiction and determination — Whether application to refer questions to Federal Court could be allowed

The plaintiffs filed an originating summons ('OS 6') essentially seeking to declare the Emergency (Essential Powers) Ordinance 2021 and Constitution (Amendment) Act 1981 unconstitutional. The plaintiffs, pursuant to s 84 of the Courts of Judicature Act 1964 ('the CJA'), filed an application to refer seven constitutional questions to the Federal Court ('encl 7'). By a notice of application, the first, second and third interveners applied to be added as interveners in the OS 6 and this was allowed. By another notice of application, the fourth and fifth interveners also applied to be added as interveners in the OS 6 and was also allowed. The fourth and fifth interveners pursuant to art 128(2) of the Federal Constitution ('the FC') and/or s 84 of the CJA, filed an application to refer four constitutional questions to the Federal Court ('encl 13'). In the meantime, the Badan Peguam Malaysia had also filed an originating summons ('OS 22') essentially seeking to declare the Emergency (Essential Powers) Ordinance 2021 and Constitutional (Amendment) Act 1981 unconstitutional. By an amended notice of application, the plaintiff pursuant to art 128 of the FC and/or s 84 of the CJA, filed an application to refer 27 constitutional questions to the Federal Court ('encl 47'). Both encls 7 and 13 in OS 6 and encl 47 in OS 22 were heard together. The issues for consideration were: (a) whether the constitutional questions framed to be referred to the Federal Court under art 128 of the FC and/or s 84 of the CJA were within the ambit of the Federal Court's jurisdiction and determination; and (b) whether the application to refer the questions to the Federal Court could be allowed.

Held, dismissing the applications:

(1) It was only in a narrow category of exceptional cases — those expressly stipulated in art 128(1) of the FC — that such questions must be determined by the Federal Court at first instance. The power to interpret constitutional provisions was not exclusive to the Federal Court. Under the constitutional scheme, the Federal Court was generally a court of last resort for all constitutional questions. The challenges made were on the validity of the law on the ground that it violated arts 4, 8 and 121 of the FC, not on the ground that the Parliament had no power to enact the laws. Clearly, such questions could be determined by any other court of the land, ie the High Court. Such issues did not fall under the exclusive jurisdiction of the Federal Court. Thus, the applications to refer the questions to the Federal Court should not be allowed (see paras 42, 46, 52 & 54).

[Bahasa Malaysia summary

Plaintif memfailkan saman pemula ('OS 6') pada dasarnya bertujuan mengisytiharkan Ordinan Darurat (Kuasa-Kuasa Perlu) 2021 dan Akta Perlembagaan (Pindaan) 1981 tidak berperlembagaan. Plaintif, menurut s 84 Akta Kehakiman Mahkamah 1964 ('AKM'), memfailkan permohonan untuk merujuk tujuh soalan perlembagaan kepada Mahkamah Persekutuan ('lampiran 7'). Melalui notis permohonan, pencelah pertama, kedua dan ketiga memohon untuk ditambah sebagai pencelah dalam OS 6 dan ini dibenarkan. Dengan satu lagi notis permohonan, pencelah keempat dan kelima juga memohon untuk ditambah sebagai pencelah dalam OS 6 dan juga dibenarkan. Pencelah keempat dan kelima menurut perkara 128(2) Perlembagaan Persekutuan ('PP') dan/atau s 84 AKM, memfailkan permohonan untuk merujuk empat soalan perlembagaan kepada Mahkamah Persekutuan ('lampiran 13'). Dalam pada itu, Badan Peguam Malaysia juga telah memfailkan saman pemula ('OS 22') pada dasarnya bertujuan mengisytiharkan Ordinan Darurat (Kuasa-Kuasa Perlu) 2021 dan Akta Perlembagaan (Pindaan) 1981 tidak berperlembagaan. Melalui notis permohonan yang dipinda, plaintif menurut perkara 128 PP dan/atau s 84 AKM, memfailkan permohonan untuk merujuk 27 soalan perlembagaan kepada Mahkamah Persekutuan ('lampiran 47'). Kedua-dua lampiran 7 dan 13 dalam OS 6 dan lampiran 47 dalam OS 22 didengari bersama. Isu-isu untuk pertimbangan adalah: (a) sama ada soalan perlembagaan yang dirangka untuk dirujuk kepada Mahkamah Persekutuan di bawah perkara 128 PP dan/atau s 84 AKM berada dalam bidang kuasa dan penentuan Mahkamah Persekutuan; dan (b) sama ada permohonan untuk merujuk soalan kepada Mahkamah Persekutuan boleh dibenarkan.

Diputuskan, menolak permohonan-permohonan:

(1) Hanya dalam kategori kecil kes luar biasa — yang dinyatakan dengan

jelas dalam perkara 128(1) PP — bahawa soalan sedemikian mesti ditentukan oleh Mahkamah Persekutuan pada peringkat pertama. Kuasa untuk mentafsir peruntukan perlembagaan tidak eksklusif kepada Mahkamah Persekutuan. Di bawah skim perlembagaan, Mahkamah Persekutuan pada umumnya merupakan mahkamah pilihan terakhir untuk semua persoalan perlembagaan. Cabaran yang dibuat adalah mengenai kesahihan undang-undang atas alasan ia melanggar perkara 4, 8 dan 121 PP, bukan atas alasan bahawa Parlimen tidak mempunyai kuasa untuk menggubal undang-undang. Jelas sekali, soalan sebegitu boleh ditentukan oleh mana-mana mahkamah lain di negara, iaitu Mahkamah Tinggi. Isu sebegini tidak terletak di bawah bidang kuasa eksklusif Mahkamah Persekutuan. Oleh itu, permohonan untuk merujuk soalan kepada Mahkamah Persekutuan tidak seharusnya dibenarkan (lihat perenggan 42, 46, 52 & 54).]

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112; [1976] 1 MLRA 410, FC (refd)

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 3 MLRA 1; [2019] 5 CLJ 780, FC (refd)

Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 4 MLJ 133; [2020] 2 MLRA 1; [2020] 3 CLJ 543; [2020] 4 MLJ 133; [2020] 2 AMR 433, FC (refd)

Gan Boon Aun v PP [2016] 4 MLJ 265; [2016] 5 MLRA 443; [2016] 6 CLJ 647; [2016] 4 AMR 297, FC (refd)

Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417; [2018] 2 MLRA 547; [2018] 3 AMR 1; [2018] 4 CLJ 1, FC (refd)

Hashim bin Saud v Yahaya bin Hashim & Anor [1973] 2 MLJ 85; [1976] 1 MLRH 413 (refd)

Mark Koding v PP [1982] 2 MLJ 120; [1982] 1 MLRA 477, FC (refd)

Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor [2020] 1 MLJ 398; [2019] 6 MLRA 379; [2020] 9 CLJ 309, FC (refd)

Wee Choo Keong v Lee Chong Wleng & Anor [1996] 3 MLJ 41; [1996] 1 MLRA 367; [1996] 2 AMR 1470; [1996] 3 CLJ 508, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 84

Emergency (Essential Powers) Ordinance 2021 ss 5, 10A, 10B, 11, 11(a), (b), 14, 15, 18

Emergency (Essential Powers) (No 2) Ordinance 2021 ss 4, 24

Federal Constitution arts 4, 4(1), (3), (4), 5, 5(1), 8, 8(1), 10(1)(a), 40(1), 43, 44, 66(4), (4A), 71, 102, 104, 121, 121(1), 128, 128(1), (2), 130, 150, 150(1), (2B), (2C), (3), (5), (6), (7), (8), (8)(b),

(8)(b)(iii), (8)(b)(iv), 159, Eighth Schedule
Malaysia Act 1963 [UK] s 39(2)
National Security Council Act 2016

Edmund Bon (with Lee Yee Woei) (AmerBON) in Originating Summons No WA-24–6–02 of 2021 for the plaintiffs.
Steven Thiru (with Gregory Dass, Abdul Rashid Ismail, Azreen Ahmad Rastam and Priscilla Lim) (Rashid Zulkifli) in Originating Summons No WA-24–22–04 of 2021 for the plaintiffs.
Suzana Atan (with Mohammad Sallehuddin bin Md Ali) (Attorney General's Chambers) in Originating Summons Nos WA-24–6–02 of 2021 and WA-24–22–04 of 2021 for the defendants.
Mohamad Izzat bin Ghazali (with Ahmad Amzar bin Ahmad Azlan and Muhammad Imran bin Abu) (Nazrin & Izzat) in Originating Summons No WA-24–6–02 of 2021 for the first, second and third interveners.
Surendra Ananth (Surendra Ananth) in Originating Summons No WA-24–06–02 of 2021 for the fourth and fifth interveners.

Ahmad Kamal J:

INTRODUCTION

[1] The plaintiffs on 4 February 2021 filed an Originating Summons WA-24–6–02 of 2021 (OS 6) (encl 1) essentially seeking to declare the Emergency (Essential Powers) Ordinance 2021 and Constitution (Amendment) Act 1981 unconstitutional.

[2] The first plaintiff is the entity that is the Secretariat for work undertaken in the name of the Coalition for Clean and Fair Elections, or better known as BERSIH 2.0. The first plaintiff sues as an organisation.

[3] The second plaintiff is the President of the Malaysian Academic Movement (Pertubuhan Pergerakan Tenaga Akademik Malaysia), or better known as GERAK. The second plaintiff sues on behalf of the organisation.

[4] The third plaintiff is the President of ALIRAN (Persatuan Aliran Kesedaran Negara). The third plaintiff sues on behalf of the organisation.

[5] The fourth plaintiff is the entity that is the Secretariat for work undertaken in the name of Suara Rakyat Malaysia, or better known as SUARAM. The fourth plaintiff sues as an organisation.

[6] The fifth plaintiff is the Vice President of The Kuala Lumpur and Selangor Chinese Assembly Hall (Dewan Perhimpunan China Kuala Lumpur

dan Selangor). The fifth plaintiff sues on behaif of the organisation. A

[7] The sixth plaintiff is the entity that is the Secretariat for work undertaken in the name of SAVE RIVERS. The sixth plaintiff sues as an organisation.

[8] The seventh plaintiff is the entity that is the Secretariat for work undertaken in the name of Centre for Independent Journalism, or better known as CIJ. The seventh plaintiff sues as an organisation. B

[9] The eighth plaintiff is the Chairperson of the Coalition for Clean and Fair Elections, or better known as BERSIH 2.0. He sues as an individual. C

[10] Through the OS 6, the plaintiffs seek, inter alia, the following reliefs:

(a) a declaration that Emergency (Essential Powers) Ordinance 2021 promulgated under art 150(2B) of the Federal Constitution ('the FC') is unlawful and unconstitutional, and therefore null, void and of no effect; D

(b) alternatively, a declaration that s 14 of the Emergency (Essential Powers) Ordinance 2021 is unlawful and unconstitutional, and therefore, null, void and of no effect; and E

(c) a declaration that s 15(d) of the Constitution (Amendment) Act 1981 (Act A514) adding art 150(8) of the FC that purportedly ousts the jurisdiction of the courts is unconstitutional for violating arts 4, 8 and 121 of the FC and/or the basic structure of the FC. F

[11] On 17 March 2021, the plaintiffs, pursuant to s 84 of the Courts of Judicature Act 1964 ('the CJA'), filed an application to refer seven constitutional questions to the Federal Court (encl 7).

[12] The seven constitutional questions are as follows: G

(a) whether s 15(d) of the Constitution (Amendment) Act 1981 (Act A514) which added art 150(8) of the FC that purportedly ousts the jurisdiction of the courts in its entirety is unconstitutional for violating arts 4, 8 and 121 of the FC; H

(b) whether art 150(8)(b)(iii) of the FC, even if valid, only prevents the courts from reviewing the validity of an Ordinance made under art 150(2B) of the FC but does not prevent the review of any of the provisions of the Ordinance; I

(c) whether art 150(8) of the FC, even if valid, prevents the courts from reviewing the constitutionality of an Ordinance made under art 150(2B) of the FC that does not comply with, or that seeks to prevent, frustrate and/or disable, the requirements of art 150(3) of the FC to have such

Ordinance laid before both Houses of Parliament;

(d) whether the words 'Notwithstanding anything in this Constitution' contained in art 150(8) of the FC, even if valid, includes art 150 of the FC;

(e) given that both Houses of Parliament had not been dissolved but only stood adjourned *sine die* at the relevant times, whether the Proclamation of Emergency issued on 11 January 2021 vide, PU (A) 7/2021 and the Emergency (Essential Powers) Ordinance 2021 promulgated on 14 January 2021 vide PU (A) 12/2021 had to be laid before both Houses of Parliament without undue delay pursuant to art 150(3) of the FC;

(f) whether s 14 of the Emergency (Essential Powers) Ordinance 2021 which purports, inter alia, to disable the operation of the provisions of the FC relating to the summoning, prorogation and dissolution of Parliament and to cancel any meeting of Parliament that had been summoned but not yet held as of the coming into operation of the said Ordinance, is valid insofar as it prevents, frustrates and/or disables art 150(3) of the FC; and

(g) whether the words 'any provision of this Constitution' in art 150(6) of the FC includes art 150 of the FC.

[13] By a notice of application dated 16 March 2021 (encl 5) the first, second and third interveners applied to be added as interveners in this OS 6 and this court on 1 April 2021 allowed the first, second and third interveners to be added as interveners.

[14] The first intervener is a Senator and a politician representing the political party Malaysian Islamic Party, or better known as PAS (Parti Islam SeMalaysia ('PAS')).

[15] The second intervener is a member of the Dewan Rakyat, a Member of Parliament for Pasir Mas and a politician representing PAS.

[16] The third intervener is a Senator and a politician representing PAS.

[17] By a notice of application dated 19 March 2021 (encl 10), the fourth and fifth interveners also applied to be added as interveners in this OS 6 and this court on 1 April 2021 allowed the fourth and fifth interveners to be added as interveners.

[18] The fourth intervener is a Senator and a politician representing the political coalition Alliance of Hope, or better known as Pakatan Harapan ('PH').

[19] The fifth intervener is a member of the Dewan Rakyat, Member of Parliament for Hang Tuah Jaya and a politician representing PH. A

[20] On 8 April 2021, the fourth and fifth interveners pursuant to art 128(2) of the FC and/or s 84 of the CJA, filed an application to refer four constitutional questions to the Federal Court (encl 13). B

[21] The four constitutional questions are as follows:

(a) whether s 15(d) of the Constitution (Amendment) Act 1981 (Act A514) which added art 150(8) of the FC was void for being ultra vires the power to amend the FC under art 159*;* C

(b) whether art 150(8)(b)(iii) and/or (iv) of the FC has the effect of ousting the jurisdiction of the High Court to:

(i) determine challenges to specific provisions of Ordinances made pursuant to art 150(2B) as opposed to challenges to an Ordinance as a whole; and D

(ii) determine challenges to specific provisions of Ordinances made pursuant to art 150(2B) on the grounds that those provisions were made in excess of power and thus ultra vires and void. E

(c) whether the power to promulgate Ordinances under art 150(2B) of the FC extends to the promulgating of a provision of an Ordinance that has the effect of nullifying or otherwise suspending art 150(3); and

(d) whether s 14 of the Emergency (Essential Powers) Ordinance 2021 is void. F

[22] In the meantime, the Badan Peguam Malaysia (plaintiff) has also filed an Originating Summons WA-24–22–04 of 2021 (OS 22) (encl 1) essentially seeking to declare the Emergency (Essential Powers) Ordinance 2021 and Constitutional (Amendment) Act 1981 unconstitutional. G

[23] By an amended notice of application dated 19 August 2021, the plaintiff pursuant to art 128 of the FC and/or s 84 of the CJA, filed an application to refer 27 constitutional questions to the Federal Court (encl 47). H

[24] The 27 constitutional questions are as follows:

(1) whether art 150 of the FC in its literal interpretation is overbroad and unconstitutional as being inconsistent with the basic structure of the FC? I

(2) whether art 150 of the FC is overbroad and unconstitutional, as implemented by the Emergency (Essential Powers) Ordinance 2021 published in the Federal Government *Gazette* PU (A) 12/2021 on

14 January 2021 (Ordinance No 1), the Emergency (Essential Powers) (No 2) Ordinance 2021 published in the Federal Government *Gazette* PU (A) 110/2021 on 11 March 2021 (Ordinance No 2), and the Emergency (Essential Powers) (Amendment) Ordinance 2021 published in the Federal Government *Gazette* PU (A) 151/2021 on 31 March 2021 (Ordinance No 1 (Amendment), and is therefore violative of the basic structure of the FC?

(3) in the further alternative, whether art 150 of the FC is unconstitutional as permitting by the enactments of the Emergency Ordinances (Ordinance No 1, Ordinance No 2 and Ordinance No 1 (Amendment), the suspension of Parliament and the removal of all Executive accountability, and is therefore inimical to a democratic government and in contravention of the basic structure of the FC?

(4) whether the amendments to art 150(6) of the FC (by s 39(2) of the Malaysia Act 1963 (Act 26/1963)) and art 150(8)(b) of the FC (by s 15(d) of the Constitution (Amendment) Act 1981 (Act A514)) are unconstitutional as being inconsistent with arts 4(1) and 121(1) of the FC and the basic structure of the FC, and are therefore null and void and of no legal effect?

(5) whether arts 150(6) and 150(8) of the FC are unconstitutional as being inconsistent with, arts 4(1) and 121(1) of the FC and the basic structure of the FC, and the therefore null and void and of no legal effect?

(6) whether arts 150(6) and (8) of the FC are unconstitutional as being inconsistent with arts 4 and/or 5 and/or 8 and/or 121(1) of the FC and are therefore null and void and of no legal effect?

(7) whether s 14 of Ordinance No 1 is unconstitutional as being inconsistent with, and in breach of, arts 44, 150(3) and 150(5) of the FC?

(8) whether s 15 of Ordinance No 1 is unconstitutional as being inconsistent with, and in breach of, arts 71, 150(2C) and the Eighth Schedule of the FC?

(9) whether s 11(a) of Ordinance No 1 is unconstitutional as being inconsistent with, and in breach of, art 43 of the FC?

(10) whether s 11(b) of Ordinance No 1 is unconstitutional as being inconsistent with, and in breach of, art 71 and the Eighth Schedule of the FC?

(11) whether s 18 of Ordinance No 1 is unconstitutional as being inconsistent with, and in breach of, art 4(1) of the FC?

(12) whether s 5 of Ordinance No 1 is unconstitutional as being inconsistent with, and in breach of, art 121(1) of the FC?

(13) consequent to questions 7 to 12 hereinabove, whether ss 5, 11, 14, 15, and 18 of Ordinance No 1 are invalid, null and void in law and of no legal effect?

(14) whether s 4 of Ordinance No 2 is unconstitutional as being inconsistent with, and in breach of, art 10(1)(a) of the FC?

(15) whether s 24 of Ordinance No 2 is unconstitutional as being inconsistent with, and in breach of arts 5(1) and 8(1) of the FC?

(16) consequent to questions 14 and 15 hereinabove, whether ss 4 and 24 of Ordinance No 2 are invalid, null and void in law and of no legal effect?

(17) whether s 2 of Ordinance No 1 (Amendment), which inserts ss 10A and 10B in Ordinance No 1, is unconstitutional as being inconsistent with, and in breach of, arts 102 and 104 of the FC?

(18) whether ss 10A and 10B in Ordinance No 1 are unconstitutional as being inconsistent with, and in breach of, arts 102 and 104 of the FC?

(19) consequent to questions 17 and 18 hereinabove, whether s 2 of Ordinance No 1 (Amendment) and ss 10A and 10B of Ordinance No 1 are invalid, null and void in law and of no legal effect?

(20) whether, pursuant to art 150(3) of the FC, the first defendant and/or the second defendant are under a constitutional duty to forthwith advise the Yang di-Pertuan Agong (YDPA) to summon a meeting of Parliament for the Proclamation of Emergency dated 11 January 2021 published in the Federal Government *Gazette* PU (A) 7/2021 on 12 January 2021 (the Proclamation of Emergency), Ordinance No 1, Ordinance No 2 and Ordinance No 1 (Amendment) to be laid before both Houses of Parliament and for all necessary and appropriate resolutions to be passed?

(21) whether, pursuant to art 150(3) of the FC, the first defendant and/or the second defendant are also under a constitutional duty to forthwith advise the YDPA to summon a meeting of Parliament for the Emergency (Prevention and Control of Infectious Diseases) (Amendment) Ordinance 2021 published in the Federal Government *Gazette* PU (A) 76/2021 on 25 February 2021 to be laid before both Houses of Parliament and for all necessary and appropriate resolutions to be passed?

(22) whether, pursuant to art 150(3) of the FC, the first defendant and/or the second defendant are also under a constitutional duty to forthwith advise the YDPA to summon a meeting of Parliament for the Emergency (Employees' Minimum Standards of Housing, Accommodations and Amenities) (Amendment) Ordinance 2021 published in the Federal Government *Gazatte* PU (A) 77/2021 on 25 February 2021 to be laid before both Houses of Parliament and for all necessary and appropriate resolutions to be passed?

A (23) whether the Executive's or cabinet's power during the time of an emergency under art 150(1) of the FC extends to a power, exercised by the Cabinet acting on its own, to revoke the Emergency Ordinances promulgated by the YDPA under art 150(2B) or whether the power of annulment or revocation rests solely with the YDPA and/or Parliament?

B (24) whether the obligation to act on advice placed on the YDPA under art 40(1) of the FC applies to the continuance or revocation of Emergency Ordinances promulgated by the YDPA under art 150(2B) while a Proclamation of Emergency is in operation that has been C premised on his satisfaction that circumstances existed that rendered the promulgation of such Ordinances necessary?

(25) whether, on a true and proper construction of the provisions in art 150(3), a Proclamation of Emergency that has already expired and the Emergency Ordinances promulgated thereunder may still be the subject D of a resolution or resolutions to annul the same by both Houses of Parliament and, if the answer is in the negative, the effect on the Ordinances promulgated thereunder?

(26) whether Executive action or a cabinet decision to unilaterally revoke the E Emergency Ordinances promulgated by the YDPA under art 150(2B) is valid, and if the result of such unilateral action is invalid whether the Emergency Ordinances continue to be in force for a period of six months from the date of expiry of the Proclamation of Emergency under art 150(7); and

F (27) arising from the above, whether the time-line under art 150(7) would apply to those Ordinances that contain within themselves the limitation clause to withstand 'for as long as the emergency is in force' such that in the case of this class of Ordinances or the affected provisions governed by this limitation their expiry would have been on 1 August 2021 along with G the expiry of the Proclamation of Emergency?

[25] Both encls 7 and 13 in OS 6 and encl 47 in OS 22 are fixed to be heard together.

H **[26]** After the hearing, I dismissed encls 7 and 13 in OS 6 and encl 47 in OS 22. I will now set out the grounds of my judgment.

ISSUES

I **[27]** Having perused the cause papers, I am of the view that the issues to be determined are as follows:

(a) whether the constitutional questions framed to be referred to the Federal Court under art 128 of the FC and/or s 84 of the CJA are within the

ambit of the Federal Court's jurisdiction and determination; and

(b) whether the application to refer the constitutional questions to the Federal Court can be allowed.

THE DECISION OF THE COURT

First issue: Whether the constitutional questions framed to be referred to the Federal Court under art 128 of the FC and/or s 84 of the CJA are within the ambit of the Federal Court's jurisdiction and determination?

Applicable provisions and cases

[28] Section 84 of the CJA allows the High Court to refer questions regarding the effect of any provision of the Constitution to the Federal Court.

[29] Section 84 of the CJA reads as follows:

> 84 Reference of constitutional question by High Court
>
> (1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.
>
> (2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.
>
> (3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.
>
> (4) *Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.* (Emphasis added.)

[30] The above provision was considered by the Court of Appeal in *Wee Choo Keong v Lee Chong Wleng & Anor* [1996] 3 MLJ 41; [1996] 1 MLRA 367; [1996] 2 AMR 1470; [1996] 3 CLJ 508, where it was held as follows:

> We will first consider the effect of s 84 of the Courts of Judicature Act 1964, under which the application to refer was made. It relates to the situation where in any proceedings before the High Court judge may in his discretion refer a question

relating to the effect of any provision of the Constitution to the Federal Court by way of a special case. *Before deciding so the judge must be satisfied that the constitutional question sought to be referred must have a direct bearing to the matter of dispute before him and that the decision of the Federal Court must have the effect of bringing the determination of the dispute before him to a speedy and economical end*.

Per Siti Norma Yaakob JCA:

In some way the dispute must be related to the constitutional question sought to be referred and that there must be a difficult issue or issues posed by the dispute that are irreconcilable with a constitutional provision and it is only in this situation that reference of a constitutional question becomes necessary

Per Abdul Malek Ahmad JCA:

Subsection (1) of s 84 of the Act provides that where in any proceedings in the High Court a question arises as to the effect of any provision of the Federal Constitution, the judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court. Read in its proper context, 'the effect of any provision', in my view must surely mean *a constitutional provision that has left room for doubt in the sense that it is vague or ambiguous which necessitates a proper construction from the Federal Court.* (Emphasis added.)

Per Abu Mansor JCA:

It is settled law that a reference is only done if *a question arises in the course of the proceedings before him and there is ambiguity and it would help to advance the rapid conclusion of that proceedings*. (Emphasis added.)

[31] Based on the case, in referring a question or questions relating to the effect of any provision of the FC to the Federal Court by way of a special case under s 84 of the CJA, the High Court must be satisfied that:

(a) the constitutional question sought to be referred must have a direct bearing to the matter of dispute;

(b) the constitutional question involved must be on the constitutional provision that has left room for doubt in the sense that it is vague or ambiguous which necessitates a proper construction from the Federal Court; and

(c) the decision of the Federal Court must have the effect of bringing the determination of the dispute to a speedy and economical end.

[32] It must be noted that in *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265; [2016] 5 MLRA 443; [2016] 6 CLJ 647; [2016] 4 AMR 297, the Federal Court held as follows:

(2) Under s 30 of the CJA, the High Court judge had to consider and decide whether there was a question of constitutional issue on a matter referred to it by the sessions court that was necessary for the determination of the proceedings before the sessions court. If the matter referred to the High Court did not relate to a constitutional issue to be determined by the Federal Court, it should be sent back to the transmitting court, which in this case was the sessions court for speedy disposal. On the other hand, if the High Court found that a decision on a question as to the effect of a provision of the Constitution was necessary for the determination of the proceedings in the sessions court, it was the duty of the High Court judge under s 84 of the CJA to state the question which had arisen in the form of a special case and transmit that special case to the Federal Court in accordance with the Rules of the Federal Court. Further both ss 30(3) and 84(4) of the CJA made reference to the Rules of the Federal Court, which contained specific provisions to deal with references under ss 30 and 84 of the CJA. It was thus plainly obvious that the Legislature had intended to empower *only the Federal Court to determine a question as to the effect of any provision of the constitution in a reference under* s 30 of the CJA. *The High Court did not have such power* (see paras 21–24).

(3) It is trite that where the words of the statutory provision were clear and unambiguous, a court should give effect to its plain meaning. In the present case, the literal approach of interpretation should be adopted for the provisions of ss 30 and 84 of the CJA. It was clear from reading the provisions of ss 30 and 84 of the CJA together with relevant provisions of the Rules of the Federal Court 1995 that *it was the intention of the Legislature that the jurisdiction and power was vested with the Federal Court to decide on the constitutionality of any matter that had arisen in the subordinate court and transmitted to the High Court. The High Court judge did not have the power or duty to determine a question as to the effect of a provision of the Constitution* (see paras 27–28 & 32). (Emphasis added.)

[33] It must also be noted that in *Gan Boon Aun* , the reference was made by the subordinate courts to the Federal Court.

[34] On the other hand, the Federal Court in *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417; [2018] 2 MLRA 547; [2018] 3 AMR 1; [2018] 4 CLJ 1 held that the High Court has jurisdiction where the challenges were made on the basis that the law is inconsistent with provisions in the Federal or State Constitution. Raus Sharif, CJ (as he then was) delivering the judgment of the Federal Court held as follows:

[38] As such, it is clear that arts 4(3), 4(4) and 128(1)(a) do not apply to challenges to the validity of legislation on any other ground than where a legislative body has made law on matters beyond its legislative competence. These other grounds include *challenges on the basis that the law is inconsistent with certain provisions in the Federal or State Constitution, and that a State Enactment is inconsistent with Federal law.* Challenges on other grounds are not subject to any of the restrictions above, and the *High Court has jurisdiction to determine the matter.* (Emphasis added.)

[35] His Lordship in his judgment had clearly defined the scope of arts 4(3), 4(4) and 128(1) of the FC. His Lordship also had explained and emphasised the jurisdiction of the Federal Court. He stated as follows:

> [23] The jurisdiction of this court, governed by the Federal Constitution, is of four kinds: appellate jurisdiction, exclusive original jurisdiction under art 128(1), referral jurisdiction under art 128(2), and advisory jurisdiction under art 130 (*Kulasingam v Public Prosecutor* [1978] 2 MLJ 243; [1978] 1 LNS 83). In filing this petition, the petitioner seeks to invoke the exclusive original jurisdiction of this court under art 128(1)(a) of the Federal Constitution:
>
> 128 Jurisdiction of Federal Court
>
> (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction:
>
> (a) *any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws*; and
>
> (b) disputes on any other question between States or between the Federation and any State. (Emphasis added.)
>
> [24] The type of suit in which a challenge to the validity of a legislation can be made depends on the ground of invalidity put forward (KC Vohrah, PTN Koh, PSW Ling (eds), Sheridan & Groves, *The Constitution of Malaysia* (5th Ed) (Kuala Lumpur: Malayan Law Journal, 2004)). The jurisdiction of the courts to declare a law invalid on a particular ground was eloquently articulated by Suffian LP in an oft-quoted passage in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112; [1976] 1 LNS 3, which is worth reproducing in full:
>
> Under our Constitution written law may be invalid on one of these grounds:
>
> (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, art 74 or
>
> (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see art 4(1) or
>
> (3) in the case of State written law, because it is inconsistent with Federal law, art 75.
>
> The court has power to declare any Federal or State law invalid on any of the above three grounds.
>
> The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.

But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

First, cl (3) of art 4 provides that the validity of any law made by Parliament or by a State legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant Legislature has no power to make law, except in three types of proceedings as follows:

(a) in proceedings for a declaration that the law is invalid on that ground; or

(b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or

(c) if the law was made by a State Legislature, in proceedings between the Federation and that State.

It will be noted that proceedings of types (b) and (c) are brought by Government, and there is no need for anyone to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. Proceedings of type (a) may however be brought by an individual against another individual or against Government or by Government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.

Secondly, cl (4) of art 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, *cl (1) of art 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State Legislature is invalid on the ground that it relates to a matter with respect to which the relevant Legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in the land.* (Emphasis added.)

[36] Further, in *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 3 MLRA 1; [2019] 5 CLJ 780, the Federal Court held as follows:

[56] Leave from the Federal Court is only required in proceedings for a declaration that a law is invalid on that specific ground. In such proceedings, the Federal Court has exclusive original jurisdiction to determine the matter (see: art 128(1)(a)).

[57] There are of course other grounds on which the validity of a law may be challenged. For instance, *a law may be invalid because it is inconsistent with certain provisions in the FC* (art 4(1)), or a State law may be invalid because it is inconsistent with a Federal law (art 75). The court's power to declare a law invalid on any of these other grounds 'is not subject to any restrictions, and may be exercised by any court

in the land and in any proceeding whether it be started by government or by an individual' (see *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 at p 113). (Emphasis added.)

[37] In *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133; [2020] 2 MLRA 1; [2020] 3 CLJ 543; [2020] 4 MLJ 133; [2020] 2 AMR 433, the appellant filed an originating summons (OS) in the High Court essentially seeking to declare the National Security Council Act 2016 ('the NSCA') unconstitutional. The OS also sought to declare as unconstitutional and void ss 12, 2 and 8 of, respectively, the Constitutional (Amendment) Acts of 1983, 1984 and 1994 (the amending provisions), as well as arts 66(4) and (4A) of the FC. *By consensus of the parties,* the High Court, pursuant to s 84 of the CJA referred by way of a special case the following constitutional questions to the Federal Court for its determination. It was held that:

> [22] Thus the drafters of the FC and CJA envisaged that the reference jurisdiction under (now) s 84 of the CJA was not to be exercised automatically or invariably in every case. *The High Court should generally and ordinarily determine constitutional questions at first instance, barring those within the original jurisdiction of the Federal Court. Not all cases should be referred to the Federal Court for determination. It is implicit in the constitutional and statutory scheme that the 'special cases' suitable to be referred to and determined by the Federal Court must necessarily be subject to certain conditions.* (Emphasis added.)

[38] It is interesting to note that the Federal Court, speaking through Nallini Pathmanathan FCJ declined to answer the constitutional questions posed and remitted the OS back to the High Court. It was held as follows:

> [30] It is clear that in. dealing with a reference under s 84 CJA, the Federal Court is not bound to answer the constitutional question posed in the terms framed. This has been held in *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120 at p 123, in which one of the questions referred to the Federal Court was whether Parliament has power to amend the constitution so as to alter its basic structure. Suffian LP found it unnecessary to answer the question for the purposes of deciding that case.
>
> [31] Thus, *the suggestion that the Federal Court has no choice but to answer any constitutional question referred to it in every case under* s 84 CJA *is misguided* , and founded on a misunderstanding of the role and powers of the Federal Court.
>
> ...
>
> [64] *In the absence of an actual controversy affecting the rights of parties, the constitutional questions referred to us are abstract and purely academic. The questions have not become academic due to some change in the factual substratum; they were academic for there was no real dispute underlying them to begin with.* They exist in a complete factual vacuum in the case before us. To answer the questions posed would be a significant departure from the deep-rooted and trite rule that the court does not entertain abstract or academic questions, and may even represent a fundamental

shift away from the common law model of concrete review towards the European model of abstract review in constitutional adjudication. Exceptionally cogent reasons would need to be provided to persuade the Federal Court to undertake such a radical departure from established principle. In this case, the parties have not attempted to do so.

[65] Although the constitutional questions posed are undoubtedly of importance, based on the cause papers before us, we regretfully consider that *this is not a proper case for the Federal Court to answer the questions in the abstract. In the circumstances, we are constrained to go no further than to express our grave reservations as to the constitutional validity of the NSCA.*

[66] We note that several guidelines in respect of references to the Federal Court under s 84 CJA were formulated by the Court of Appeal in *Wee Choo Keong v Lee Chong Meng & Anor* [1996] 3 MLJ 41. Our decision does not turn on those guidelines. *In view of the abstract nature of the questions and the absence of an actual controversy, it is not necessary to examine the scope and correctness of those guidelines for the purposes of this case.*

CONCLUSION

[67] *Based on the foregoing, under the powers available to the Federal Court in* s 84 of the CJA*, we would decline to answer the constitutional questions posed. In view of the particular circumstances of this case, we therefore remit the case to the High Court.* (Emphasis added.)

EXCLUSIVE JURISDICTION OF THE FEDERAL COURT

[39] It is important to note that the jurisdiction of the Federal Court is governed by the FC. They are of appellate jurisdiction, exclusive original jurisdiction under art 128(1), referral jurisdiction under art 128(2) and advisory jurisdiction under art 130.

[40] The general notion of the FC is to empower all courts to interpret the Constitution. However, only challenges as to the competence of the Legislative body to enact a law fall within the original jurisdiction of the Federal Court.

[41] In *Harding, Law, Government and the Constitution in Malaysia* (Kuala Lumpur: Malayan Law Journal, 1996) at p 138 it is stated:

> The Federal Court is not a constitutional court, but as the final court of appeal on all questions of law, is the final arbiter on the meaning of constitutional provisions.

[42] It is my considered opinion that it is only in a narrow category of exceptional cases — those expressly stipulated in art 128(1) of the FC — that such questions must be determined by the Federal Court at first instance.

[43] The jurisdiction of the courts to declare a law invalid on a particular

ground was expressed by Suffian LP in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 at p 113; [1976] 1 MLRA 410. His Lordship stated as follows:

> ... Thirdly, cl (1) of art 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. *This jurisdiction is exclusive to the Federal Court, no other court has it'. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the court in the land.*
>
> *My order on the application is that this matter be remitted back for continuation of trial by the High Court.* (Emphasis added.)

[44] The court in the case of *Hashim bin Saud v Yahaya bin Hashim & Anor* [1973] 2 MLJ 85; [1976] 1 MLRH 413 held that while s 84 of the CJA allows the High Court to refer questions regarding the effect of any provision of the Constitution to the Federal Court, the High Court is not obliged to do so and may dispose of the questions. Indeed, in *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120; [1982] 1 MLRA 477, the Federal Court has expressed a preference for the High Court to determine constitutional questions itself.

[45] On the issue of the exclusive jurisdiction of the Federal Court, the apex court in *Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor* [2020] 1 MLJ 398; [2019] 6 MLRA 379; [2020] 9 CLJ 309 took the approach and reaffirmed the position in *Gin Poh Holdings*. Azahar Mohamed CJ (Malaya) in his judgment stated as follows:

> [8] First, art 128(1) of the Federal Constitution that stipulates on the exclusive original jurisdiction of the Federal Court to determine whether a law made by Parliament is invalid on the ground that Parliament has made provision with respect to a matter, which Parliament has no power to make laws. The article reads as follows:
>
> 128 Jurisdiction of Federal Court
>
> (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction:
>
> (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
>
> (b) disputes on any other question between States or between the Federation and any State.
>
> (2)–(3)
>
> [9] The next relevant provision of the Federal Constitution is art 4. Clauses (3) and

(4) of art 4 of the Federal Constitution in particular provides the grounds in which the validity of any law made by Parliament or the Legislature of any State can be challenged by way of a proceeding for a declaration that the law is invalid and such proceeding shall not be commenced without the leave of a judge of the Federal Court. Clauses (3) and (4) of art 4 read as follows:

> 4 Supreme law of the Federation
>
> (1)–(2) ...
>
> (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or:
>
> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) If the law was made by the Legislature of a State, in proceedings between the Federation and that State.
>
> (4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[10] In short, art 4(3) allows a law to be challenged on the ground that Parliament has legislated on a matter that it had no power to do so.

[11] This brings me to the judgment of the Federal Court in *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112; [1976] 1 LNS 3 ('Ah Thian'). This case represents the law on the subject matter as we apply today in relation to the jurisdiction of the courts to declare a law invalid. In this case, Suffian LP in delivering the judgment of the Federal Court put in plain words that validity of a law could be challenged on one of the three grounds as follows:

> (a) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, art 74 or
>
> (b) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see art 4(1) or
>
> (c) in the case of State written law, because it is inconsistent with Federal law, art 75.

Suffian LP went on to say:

> The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any

proceeding whether it be started by Government or by an individual.

[12] The Federal Court in *Gin Poh Holdings Sdn Bhd v The Government of The State of Penang & Ors* [2018] 3 MLJ 417; [2018] 4 CLJ 1 ('Gin Poh Holdings') reaffirmed the position in *Ah Thian* whereby the applicability of arts 4(3), 4(4) and 128(1)(a) is confined to situations where Parliament or the State Legislature has strayed beyond matters within their legislative competence based on the constitutional provisions in the Legislative Lists in the Ninth Schedule of the Federal Constitution.

[13] Recently, Ahmad Maarop (CJ Malaya) (as His Lordship then was) in *Petroliam Nasional Bhd (Petronas) v Kerajaan Negeri Sarawak* [2018] MLJU 1371; [2018] 10 CLJ 433 held that arts 4(3), 4(4) and 128(1)(a) of the Federal Constitution apply only where the validity of a law is challenged on the ground that it 'makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws'. It was held that the declaratory reliefs sought by the applicant did not come within the ambit of els (3) and (4) of art 4. Hence, the declaratory reliefs sought by the applicant were not within the exclusive original jurisdiction of the Federal Court. The declaratory reliefs sought were within the original jurisdiction of the High Court. Thus, the question of leave under art 4(4) did not arise.

[14] Therefore, not all constitutional challenges on the validity of a law falls within the situation envisaged in els (3) and (4) of art 4 of the Federal Constitution, it is with this principle in mind that I approach the present issues that call for my determination in the present application.

[46] Therefore, based on the above, it is my view that the power to interpret constitutional provisions is not exclusive to the Federal Court. Under the constitutional scheme, therefore, the Federal Court is generally a court of last resort for all constitutional questions.

[47] Coming back to the fact in the present case, based on the applications filed, it has been averred by the plaintiffs that the questions should be referred to the Federal Court for a final determination of the dispute, and for speedy and economical end.

[48] Having perused the 38 constitutional questions posed by the plaintiffs, it is clear that the applications before this court falls within the jurisdiction of the High Court, not within the exclusive jurisdiction of the Federal Court.

[49] I find that the validity of the law to be challenged is not on the ground that the Parliament has strayed beyond matters within its legislative competence. The validity of the law in these applications is challenged on the ground that it is unconstitutional for violating the basic structure of the Constitution under arts 4, 8 and 121 of the FC.

[50] As has been decided in *Mark Koding*, in which one of the questions referred to the Federal Court was whether Parliament has power to amend the Constitution so as to alter its basic structure. Suffian LP found it unnecessary to answer the question for the purposes of deciding that case.

[51] It is clear that art 128(1) of the FC provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State Legislature is invalid on the ground that it relates to a matter with respect to which the relevant Legislature has no power to make law. In this case, the Parliament. If that is the case, the jurisdiction is exclusive to the Federal Court. This proceeding can only be commenced by any individual with the leave of a judge of the Federal Court.

[52] I view that in this case, the challenges made were on the validity of the law on the ground that it violated arts 4, 8 and 121 of the FC, not on the ground that the Parliament had no power to enact the laws. Clearly, such questions can be determined by any other court of the land, ie the High Court. Such issues to me do not fall under the exclusive jurisdiction of the Federal Court.

CONCLUSION

[53] Having considered the applications, I am of the considered opinion that the subject matter of these applications is not within the exclusive jurisdiction of the Federal Court. The jurisdiction to determine the constitutional questions lies within the High Court.

[54] Thus, on the second issue as to whether the applications to refer the questions to the Federal Court should be allowed; I would answer it in the negative.

[55] Based on the aforesaid reasons, these applications to refer the questions to the Federal Court under art 128 of the FC and/or s 84 of the CJA are hereby dismissed with no order as to costs.

Applications dismissed.

Reported by Ahmad Ismail Illman Mohd Razali